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Postprint / Postprint

Zeitschriftenartikel / journal article

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#### Empfohlene Zitierung / Suggested Citation:

Djelic, M.-L. (2005). From Local Legislation to Global Structuring Frame: the Story of Antitrust. *Global Social Policy*, 5(1), 55-76. <https://doi.org/10.1177/1468018105050120>

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# *From Local Legislation to Global Structuring Frame*

## *The Story of Antitrust*

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**ABSTRACT** If we take a long-range view of competition regimes, we can document in the 20th century a case of major transformation. There has been a double evolution – away from cooperation and cartelization and towards competition on the one hand, from nationally bounded regimes to a globally interconnected regulatory sphere on the other. The antitrust tradition that emerged in the USA at the turn of the 20th century has gained significant and widespread influence after 1945, imposing itself in many parts of the world. The objective of this article is to retrace the process by which antitrust has gone from being a local legal rule to a nearly global structuring frame. We trace the fate of a local set of ideas turning into international politics and globally accepted principles. We also show that those global principles are subject to and interact with local politics – through the process of diffusion but also in their implementation.

**KEYWORDS** *antitrust legislation, competition regimes, global principles, local politics*

### *Introduction*

Competition regimes contribute significantly to the structuring of economic activity and the shaping of economic behaviour (Djelic, 1998; Dobbin and Dowd, 2000; Stearns and Allan, 1996). By ‘competition regime’, we mean the normative and structural institutions that define, in any particular context, the accepted and legal balance between competition and cooperation while shaping the local understanding of competition.

If we take a long-range view of competition regimes, we can document in the 20th century a case of major transformation. By the end of the Second

World War, competition regimes were predominantly set and structured within national boundaries and only had national reach. By then and even much later in some regions or countries, the balance tended to be in favour of cooperation and cooperative arrangements. In most countries, competition was viewed suspiciously as bringing along disruptions of both the economic and social order, chaos and suboptimal allocation of resources (Djelic, 2002; Magnusson, 1994). Cooperation and cooperative agreements – monitored either by firms themselves, associations or even the State – were plebiscited as leading to orderly economic development with minimal disruptive or destructive effects. This preference for cooperation had translated at the international level during the interwar period. Those were the heydays of international cartels – linking together either several national firms or several national cartels (Haley, 2001; Kudo and Hara, 1992).

In that context, the USA were highly exceptional. In 1890, that country had declared cartels and all other forms of interfirm agreements illegal. The antitrust tradition that developed locally from that point on came together with the championing of competition and its benefits (Peritz, 1996). At the level of discourse, the American antitrust tradition associated with a neo-classical understanding of competition. In practice, however, American antitrust ended up fostering an oligopolistic form of competition (Djelic, 2002). In about half a century, this exceptional – and in 1945 still highly marginal – competition regime has gained significant influence, imposing itself in many parts of the world. More than 90 countries have today a competition regime that is inspired overall by the same basic principles. What is more, we have witnessed an extension and expansion of the reach of this particular type of competition regime into transnational arenas – towards the European Union (EU), the World Trade Organization (WTO), North American Free Trade Agreement (NAFTA), and African regional agreements.

The double evolution – away from cooperation and cartelization and towards competition on the one hand, from nationally bounded regimes to a globally interconnected regulatory sphere on the other – undeniably amounts to a major transformation of economic rules of the game in many parts of the world. The objective of this article is to retrace the process by which antitrust has gone from being a local legal rule to becoming a nearly global structuring frame, with a potentially significant impact on the homogenization of market conditions. Hence, we are looking at the emergence of antitrust as a key mechanism of the process of globalization.

The story we tell is a story in four stages. The first stage was the emergence of antitrust in the USA at the end of the 19th century. A second stage was the attempt to turn what was then a local idea into international politics. American antitrust was exported, after 1945, to a few geographical nodes with a fair degree, however, of parallel local resistance and translation. A third stage was the rapid globalization of antitrust principles starting after the fall of the Berlin Wall in the early 1990s. This stage was characterized by rapid spread

and diffusion or contagion to many regions in the world. But global ideas and principles are subject to local politics – through the process of diffusion naturally but also in the ways in which they are being implemented. The antitrust community has recognized that – acknowledging the remaining heterogeneity when it comes to antitrust implementation and practice. Hence, we have entered a fourth stage with the recent attempts at trying to bring together, at the global level, those multiple local versions of the same tradition. The International Competition Network (ICN) was created in the fall of 2001 to articulate and homogenize further local antitrust efforts, in both substance and practice.

### *A National Legislation Goes Abroad*

Throughout the first half of the 20th century, the emergence of an antitrust tradition was one more element of American exceptionalism. The American take on issues of competition and interfirm collaboration was then unique and peculiar. After 1945, the consequences of the war and a redefinition of the geopolitical context led to the first attempts at exporting – and importing – the American antitrust tradition, to Germany and Japan or to the European coal and steel community for example.

#### AN ISLAND OF ANTITRUST IN A SEA OF INTERFIRM COLLABORATION

In 1890, the US Congress voted in the Sherman Antitrust Act. Following the Civil War and its many disruptions, cartels and other forms of loose agreements had proliferated as a strategy to achieve market stabilization and control. The intent behind the Sherman Act was initially to curb the threat that those aggregates of economic power were perceived to represent and to re-establish the conditions for free and fair competition. The unique set of conditions, however, in which this Act was enacted limited its domain of applicability and had unintended consequences of significance (Peritz, 1996). Early court cases showed that cartels and other ‘restraints of trade or commerce’ across the states of the Union would be prohibited per se. The Sherman Act being a Federal legislation, however, it did not apply within states. Tight combinations or mergers within the legal frame of particular states that made them possible (such as New Jersey) seemed to lie outside its reach (Roy, 1997). And corporate lawyers were soon identifying mergers as an alternative to cartelization, legal under the Sherman Act (Sklar, 1988).

The passing of the Sherman Act was thus indirectly a triggering force in the first American merger wave (1895–1904). In an irony of history, the fight for competition in the USA led to the emergence of large, integrated firms and contributed to the oligopolistic reorganization of American industries. The Sherman Act was read as outlawing cartels and loose forms of agreements per se. With respect to size, however, and hence mergers, the interpretation that

ultimately came to dominate in the Supreme Court was that illegality stemmed not from size per se but from 'unreasonableness' – as revealed by the proven intent and purpose to exclude others and stifle competition. In 1914, the Clayton Act confirmed and institutionalized this 'rule of reason' argument for size and mergers (Peritz, 1996). By the 1920s, both the prohibition per se of cartels and the 'rule of reason' with respect to mergers had become trademarks and defining features of the American antitrust tradition. In the USA, collusion and cooperation between independent firms became legally and morally impossible. Instead, competition was valued – but in practice the American antitrust tradition was fostering oligopolistic competition (Djelic, 2002).

In Europe also, the trend towards cartelization had started during the 1860s and 1870s. It was triggered by economic, technological and political disruptions and evolutions. It revealed a search for order, stability and control that lasted well beyond in fact disturbed and troubled years. Although the trend was common, the nature of interfirm agreements varied across countries and during the period. They could be more or less formal and structured; they could be horizontal, vertical or even both. They could share markets, agree on price levels, set production quotas, collaborate on R&D or pool profits. They could be fragile temporary agreements or, as in Germany and France during the 1940s, they could be state backed, compulsory and legally enforceable. The strength and enduring character of the cartelization movement in Europe set itself in an institutional context that was tolerant of interfirm collaborations if not actively fostering them. In most European countries, competition and price wars tended to be negatively valued as essentially disruptive both to the economy and to social order. Agreements and cartels, because they set limits to competition and its associated disruptions, were identified as progressive steps away from chaos and towards orderly and rational economic development (Michels, 1928).

Because at the time the share of Europe in the total value of exports of manufactured goods was around 70%, this profound distrust of competition reflected upon international business relations. The rule, there also, was interfirm collaboration. By the 1920s and 1930s, international cartels had become very powerful and they had significant reach – different estimates show the share of international trade under cartel control at somewhere between 40% and 50% during that period (Haley, 2001; Kudo and Hara, 1992: 2ff.). The motives behind international cartels, their functions but also their degree of structure and formalization varied along the lines described above for national cartels. Hence there was, before 1940, a system of international governance for business relations – but international collaboration had then for objective to limit competition not to foster it. The seat of international cartelization was Europe but Japanese and American firms were also involved – the latter in spite of domestic antitrust regulation (Kudo and Hara, 1992). In fact, American policy towards international cartels got into a strange

twist during the 1920s. The Webb-Pomerene Act allowed, in 1918, American producers in the same line of business to form joint companies to manage their exports. In the mid-1920s, the Federal Trade Commission was expressing the view that the only test of legality for foreign cooperative agreements was that these arrangements would have no effect upon domestic conditions within the USA. American firms took that to be permission to engage in cartels outside the USA and the practice became quite common during the 1920s and 1930s. The most famous – because they were soon infamous – such involvements were those of General Electric in the Phoebus cartel, and those of Dupont, Allied Chemicals or Standard Oil in cartels dominated by the German firm IG Farben.

#### ENGINEERING A GERMAN REVOLUTION

Things changed radically after 1945 when the peculiar American tradition of antitrust was revived and crossed national borders. An important destination was Germany where the USA loomed large, both as model and architect, in the process of local institutional reinvention. A widely shared conviction that cartels had played an important role in the building up of Nazi strength led Western Allied Forces to act rapidly. In February 1947, the American Military Government imposed a decartelization and deconcentration law that set itself within the long-standing American antitrust tradition. With respect to restrictive practices, cartels, combines, syndicates or trusts, it was based on the prohibition principle, outlawing them *per se*, but it said little about size (Berghahn, 1986; Djelic, 1998).

In fact, the question of deconcentration and how far it should go generated heated debates within the American administration, in Washington and in occupied Germany (Djelic, 1998: 81ff.; Martin, 1950). The onset of the cold war settled the issue. West Germany became an important outpost in the fight against communism and as a consequence the deconcentration programme lost in significance. American authorities instead came to advocate an oligopolistic structure for the German industry. The model was American and the idea was that ‘oligopolies, when policed by the vigorous enforcement of antitrust and anticartel laws as in the United States, yield pretty good results’ (Office of Military Government for Germany, United States [OMGUS], Bd18).

American policy makers were quite aware that radical transformations of the sort they were fostering would only outlast the period of acute geopolitical dependence if Germans appropriated them. Hence, in the treaty allowing Germany to progressively regain sovereignty, the American government demanded that German agencies prepare their own competition law. This law, it was agreed, once accepted by German and Allied authorities, would replace the 1947 legislation. This did not prove an easy task, however, and the business communities, in particular, resisted violently the grafting in Germany of the American antitrust tradition (Braunthal, 1965). It took 10

years, a protracted fight and strong American pressure all along for Germans to agree on a bill. The Federal Law against Restrictions of Competition was finally enacted in July 1957.

On the whole, this law was congruent with American antitrust tradition. Cartels and loose agreements were identified as unreasonable combinations in restraint of trade and outlawed *per se*. However, the German legislator provided for a number of exceptions. The Cartel Office (*Bundeskartellamt*) was granted a certain amount of leeway through enforcement of the law and monitoring of exceptions. Antitrust had been transferred to Germany, but it had been partially translated and adapted in the process in response to heated local politics (Quack and Djelic, 2005).

#### SEEDING ANTITRUST IN THE EUROPEAN SPACE

While the USA were encouraging or imposing bilateral transfers of their antitrust tradition, they were also pressing for initiatives with a cross-national dimension. In Western Europe, France led the way with the proposal, in May 1950, to pool European coal and steel industries. Jean Monnet and the French Planning Council insisted that the goal was to create a competitive space to stimulate production and productivity (Monnet, 1976). They wanted to alleviate American fears that this project might lead to the emergence of a European wide cartel and hence they brought in American experts to prepare antitrust provisions. The key figure was Robert Bowie, Harvard antitrust lawyer and General Counsel to John McCloy, the US High Commissioner in Germany. Bowie was already involved in the drafting of a German antitrust law when he came to Paris in June 1950 – ‘on loan’ from McCloy to his friend Monnet. In Paris, he wrote the provisions that would become articles 65 and 66 of the European Coal and Steel Community (ECSC) Treaty (Monnet, 1976).

As in Germany, resistance proved strong, notably among French, Belgian and German business communities. But the final ECSC treaty endorsed anticartel and antitrust objectives and articles 65 and 66 were incorporated as a major dimension of that treaty. Article 65 dealt with cartels and loose agreements, prohibiting them in principle. However, the European enforcement agency, the High Authority, was granted some leeway to authorize, in times of crisis, a number of exceptions. In particular, it could allow national States to grant aid to individual undertakings or industries or even to accept certain types of agreements. Article 66 of the ECSC treaty dealt with abuses of market power through concentration. In line with American antitrust tradition, only ‘unreasonable’ concentration was prohibited. Mergers that could be shown to increase efficiency and productivity without representing a threat to competition could be authorized.

Those two articles gained particular historical significance when they were transferred in 1957 to the Rome Treaty. As it turned out, the coal and steel community prepared the way for a wider common market and the European



Economic Community, formalized in 1957, integrated the coal and steel pool and appropriated its institutions. In fact, the Treaty of Rome extended to most sectors of Western European economies those principles initially defined for coal and steel by the ECSC treaty. Articles 65 and 66 of that early treaty became articles 85 and 86 in the Rome treaty. In the words of Jean Monnet, those articles, ‘drafted with great care by Robert Bowie, represented a fundamental innovation in Europe’. According to him, ‘the essential antitrust [*sic*] legislation reigning over the common market today ha[d] its origins in those few sentences for which [he did] not regret to have fought during four months’ (Monnet, 1976). Here again, however, the transfer of an American antitrust tradition had come with a degree of translation and adaptation, reflecting regional if not local politics and pressures.

### *From a Handful to an Epidemic: Global Spread of Antitrust Principles*

Between that period of dense activity and the late 1980s, nothing of great significance happened with respect to internationalization of antitrust. Then, in about 10 years, antitrust spread to more than 90 countries. By the end of the 20th century, antitrust principles had de facto become structuring frames on a global scale. But global principles interacted with local politics – leading to decoupling and resilient heterogeneity across jurisdictions. Hence, efforts to connect and bridge national regimes appeared necessary, with a view to pushing homogenization in the process.

#### SPREADING ANTITRUST AT FAST SPEED

Three interconnected developments contribute to explain the antitrust ‘epidemic’ during the last 15 years of the 20th century. First, the Europeanization project picked up after a lull – boosting activity around antitrust at the community level. Then, in turn, such activism at the European level trickled down towards member states. In the late 1980s and early 1990s, the oldest member states of the European community were busy institutionalizing, stabilizing, modernizing or expanding their antitrust regimes – antitrust came back to France for example in 1986. More recent members or candidate countries in the late 1980s were starting from scratch and structuring their own national antitrust regimes (Jenny, 2002).

A second development was the extension of the ‘West’ following upon the fall of the Berlin Wall. With respect to antitrust, this triggered a wave of international missionary activity unprecedented since the 1950s and in fact on a much greater scale and scope. Both American and European antitrust authorities were actively involved in the process of ‘exporting the rules of competition regulation’ to Eastern and Central Europe but soon also to many other countries (Murriss, 2002; Pittman, 1998; Rouam, et al., 1994). In 1990, American antitrust authorities sent altogether six international technical



assistance missions. The equivalent figure for the period 1990–8 was 390, showing a remarkable increase. Technical assistance meant, in that context, helping ‘new’ countries write down antitrust laws and structure associated institutions but also providing them with resources to help implementation and monitoring.

In part as a consequence of such activity, competition laws were enacted rapidly in many countries. Diffusion undeniably meant a globalization of antitrust principles. At the same time, diffusion came through the prism of local politics and many countries translated and adapted antitrust principles to local contexts and constraints. Thus even though most competition regimes in the world today can be traced back to the American antitrust tradition, the multiplication of antitrust regimes first in Europe and then in other regions of the world, including developing countries, has not resulted in pure and simple convergence and homogeneity of rules and institutions. This variability and heterogeneity has become an issue in recent years and has led, as we show below, to a number of initiatives.

A third development, finally, was the process of economic internationalization that gained momentum in the 1990s. This process created new constraints, challenges and opportunities for antitrust, stimulating further its tendency to cross national borders. When firms expand internationally, they may take advantage of that to circumvent the legal and institutional constraints existing in their countries of origin. This could only further stimulate the ‘old’ antitrust authorities to spread as wide as possible antitrust principles and associated understandings of competition and free trade (Klein, 2000; Melamed, 2000). But even this is not enough. When economic transactions and interactions become transnational, they are likely to fall under the scrutiny of multiple national or regional jurisdictions. Homogenizing and globalizing legal principles and codified rules is an important but far from sufficient step towards reducing the risk of conflicts. Rules can be read, interpreted or implemented differently, depending upon the context in which interpretation and implementation take place – depending upon local politics. Hence, the globalization of economic activity was soon making it necessary to think of coordination between multiple national antitrust authorities as well as of further convergence not only with respect to legal principles and formal rules but also with respect to understandings and practices.

#### GLOBAL PRINCIPLES AND LOCAL POLITICS: DEALING WITH THE CHALLENGE

A first strategy to emerge was the multiplication of bilateral agreements. The USA and the EU were pioneers and signed the first such agreement initially in 1991, renewing it in 1998. The agreement provides that one party alert the other when a case affects its interests. Cooperation has been uneven but it could imply a synchronization of investigations, the sharing of information, and collaboration during the enforcement phase. The USA and the EU went

on to sign other bilateral agreements with Canada, Australia, Japan or New Zealand. By the end of the 1990s, there were bilateral agreements linking together all the most developed antitrust authorities in the world. The movement also extended to developing or transition countries. In particular, the EU signed bilateral agreements with Eastern and Central European countries as well as with other associated countries such as Morocco or Tunisia (Rouam et al., 1994).

On the whole, bilateral agreements have played an important role. However, they have inherent limitations. As an increasing number of antitrust specialists were arguing by the end of the 1990s, when antitrust goes global and concerns more than 90 countries, one cannot envision bilateral agreements linking together all those countries (Klein, 2000). Furthermore, beyond the obvious desire to cooperate they reveal, those agreements did not prevent dissonance or even conflicts as illustrated by the major transnational dispute around the General Electric (GE)/Honeywell case. Cooperation and bilateral agreements were not enough, undeniably, to counter local politics and to ensure convergence – beyond principles – of interpretations and implementation.

For that, one would need to turn to multilateral schemes or agreements and several paths were explored. An early initiative was set within the Organisation for Economic Co-operation and Development (OECD) context. The OECD Competition Law and Policy Committee (CLP) had become a forum for member countries to discuss competition policy issues. As early as 1967, the OECD published a 'Recommendation of the Council Concerning Cooperation between Member Countries on Anticompetitive Practices Affecting International Trade'. The CLP revised this recommendation in 1986 and then again in 1995. The OECD guidelines remained, however, fairly restricted in scope and were nothing more than mere recommendations with no implementation 'muscle'. In 1998, the CLP proposed a recommendation on the 'Effective Action against Hard Core Cartels'. The level of agreement reached in that context on the very harmful effects of some anticompetitive practices was extremely high. Here again, though, agreement did not lead on the ground to greater convergence in terms of formal rules, processes and practices.

The United Nations Conference on Trade and Development (UNCTAD) was another forum where the multilateral path was tested. In 1980, UNCTAD published a 'Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices' (UNCTAD-RBP-Code). Following that, UNCTAD significantly built up its technical assistance activity with the objective of helping developing countries level off with the developed world on antitrust institutionalization and enforcement. But here again the Code of Conduct of UNCTAD remained very much a set of recommendations or guidelines with no direct or binding hold on nations or local antitrust authorities.

Starting in 1996, a third initiative was driven by the EU within the WTO – and seconded there by Canada and Japan. This initiative set itself at the other side of the spectrum. The idea was to ‘negotiate a binding’ multilateral antitrust regime (Melamed, 2000). The EU identified the WTO as the institution best suited to house such a framework both due to its ‘very broad membership’ and to its ‘tradition of enforcing binding rules’ (Pons, 2002: 4). The strategy was to interweave tightly the multilateral antitrust agenda with trade negotiations. In June 1999, the EU Competition Commissioner, Sir Leon Brittan, was proposing that:

in negotiating a WTO agreement, we should aim for gradual convergence of approaches to anti-competitive practices that have a significant impact on international trade. Our objective should not be to harmonize completely national substantive rules but to identify core principles on which agreement can be reached. (Brittan, 1999)

This European initiative was received quite reluctantly. Developing countries were sceptical that adoption of a multilateral framework could be in their interest. The strongest opponents, though, were the USA who argued against a binding frame. The claim was that where countries might be ready to cooperate in meaningful ways, they might not want to be legally bound under international law.

On this basis, the USA had been pushing its own initiative since 1997. The Antitrust Division in the Department of Justice created that year the International Competition Policy Advisory Committee (ICPAC). ICPAC was asked to consider three main issues – multijurisdictional merger review, future directions in enforcement cooperation between US antitrust authorities and their counterparts around the world particularly with respect to anticartel prosecution efforts and the interface of trade and competition issues. ICPAC worked for two years, producing a report that recommended against the development of multilateral binding rules while suggesting ways of reaching non-binding agreements. The ICPAC report proposed a Global Competition Initiative to foster dialogue among antitrust officials but also between antitrust officials and broader communities with a view to bringing about common understandings and a common culture, greater convergence of laws, analyses and eventually practices. American antitrust authorities appropriated the conclusions of ICPAC and this proposal for a Global Competition Initiative became the blueprint for the International Competition Network that was set up in the fall of 2001.

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## *The International Competition Network: Global Politics of Acculturation*

The International Competition Network was officially launched in October 2001 during the Annual Conference on International Antitrust Law and Policy at the Fordham Corporate Law Institute in New York. The founding members were 13 national antitrust agencies – Australia, Canada, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the UK, the USA and Zambia – and the European competition agency. Membership was open from the beginning to all national, regional or multinational antitrust agencies and in fact the numbers rose fast. By the spring of 2002, there were already 50 members. One year later, the ICN had 77 members (Finckenstein, 2003). Given that there are around 90 competition authorities in the world, the ICN is getting close to a global reach. Furthermore, its members represent altogether close to 90% of world GDP.

### THE ICN: A VIRTUAL NETWORK

The focus of the ICN is competition – ‘all competition all the time’ (Finckenstein, 2003). This overall focus is declined in four main missions. First, the ICN aims at seeking substantive and procedural convergence among competition jurisdictions on as wide a basis as possible. Second, the ICN should facilitate international cooperation on competition issues and be an important forum for contacts between developed and developing countries. Third, the ICN hopes in time to be able to establish non-binding ‘best practices’ on competition matters. Fourth, the ICN also strives to play an important role in advocating market and competition values around the world – within competition agencies naturally but also beyond their walls, within governments, business communities or civil societies (Ugarte, 2002; <http://www.internationalcompetitionnetwork.org>).

The ICN is structured as a network and it has three main characteristics. It is inclusive, virtual and open. First, the ICN is inclusive because it encourages as wide a membership as possible. All competition authorities are welcome to join on a voluntary basis without having to fit any particular criteria.

Second, the ICN is a virtual network – with no offices, legal status, employees or even budget. Members pay for themselves and cover the costs of their own involvement with ICN, such as for example participation in the yearly conference or the costs associated with the running of projects in working groups. ICN does not have a central geographical hub or a permanent Secretariat. A steering group sets agendas and work plans, identifying priorities that then have to be approved by ICN members during the yearly conference. The country chairing the steering group takes on for a year, on a rotating basis, secretarial tasks and bears the costs associated with them. The work itself is being done within ad hoc and temporary working groups that focus on particular issues, meet rarely but use all forms of modern technology

instead. Initially, three main working groups had been set up. The Merger Review working group was run by American competition authorities and its mandate was to 'address the challenges of merger review in a multi-jurisdictional context' ([http:// www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)). The Advocacy working group was coordinated by Mexico and its objective was to develop recommendations on the means to champion and advocate antitrust and competition – 'spread the gospel' – particularly in developing or transition countries where competition regimes are quite recent. A third important working group was the Capacity Building and Competition Policy Implementation working group, co-chaired by the EU and South Africa. The objective of this working group was to rationalize and systematize technical assistance to help developing and transition countries stabilize, entrench and implement their new competition regimes.

Members of the steering group are representatives from those countries 'that are committed to going forward with the mission of the ICN' ([http:// www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)). This means, concretely, that until now representatives from the more established antitrust agencies have been dominant – and the USA has in particular played a key role. The first annual conference took place in Naples, in September 2002 and the list of participants tells us something about this unofficial but nevertheless real power imbalance. Most of the 56 competition jurisdictions present sent in 1 or 2 – at most 3 – representatives. However, Canada sent in 5 representatives, France sent 4, the European DGIV sent in 9 representatives and the USA sent 11 (<http://www.internationalcompetitionnetwork.org>). Within the ICN, some members are becoming increasingly vocal about this power imbalance and the Chairman of the Italian Competition Authority, Giuseppe Tesauro, who organized the Naples Conference, brought up the issue in his opening speech:

So far it was indeed necessary for the Steering Committee to act rapidly and with no frills. Now, I personally consider that it may be useful to ponder on some modification and improvement concerning the number of members of the Steering Committee, its composition and its working methods in order to achieve a better balance between the biggest and the smallest economic and political entities. It must be clear that all members of the competition family are the actors of the initiative and that they all play an equal role. (Tesauro, 2002)

The ICN, finally, describes itself as an open network. Only organizations can be members – and at that only competition agencies, either national or regional. Nevertheless, it keeps a number of doors open to various constituencies. It is different in that from a 'club' – although the latter imagery is sometimes used in documents and speeches. In principle, the ICN wants to 'maximize cooperation with non-governmental antitrust experts from the relevant international, industry, consumer, legal, economic and academic communities' (Ugarte, 2002). As a transnational regulatory space, the ICN

indeed attempts to co-opt experts from what could have been competing regulatory bodies – the OECD, UNCTAD or the WTO. The ICN – or more exactly its steering committee – is also highly aware of the need to build bridges with neighbouring and wider constituencies to legitimize and stabilize the type of competition regime they are championing. The way openness concretely works is that each member agency can invite one non-governmental expert to the annual conference. Working group members can also call upon some of those experts to help them in their tasks.

The list of non-governmental advisors that were invited to the conference in Naples is telling. Altogether, 48 such experts came to Naples. Five were from international fora – OECD, UNCTAD, WTO and the World Bank. Only two could be associated with the ‘consumer’ constituency although this constituency is always among the first to be mentioned by members of the ICN steering committee (Ugarte, 2002; [http:// www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)). There were three representatives of the industry constituency and nine from the academic community. All the rest were private lawyers and more particularly partners from large Anglo-Saxon law firms. It might be too early to draw conclusions from the way in which openness seems to be playing out here. However, the strong presence of large Anglo-Saxon law firms is certainly not without consequences for the way in which the ICN will evolve and function.

#### INTENT ON SPREADING A ‘CULTURE’

The ICN does not have any ambition to exercise rule-making functions. It was set up, in fact, as an alternative to the European initiative within the WTO that called for strict and binding rules. Instead, the ICN sets itself within a ‘soft law’ approach and aims at generating recommendations and guidelines (Mörth, forthcoming). From the perspective of the ICN Steering Committee, these recommendations or guidelines are ‘neutral’ – in the double sense that they will not be imposed but collectively agreed upon by most competition authorities in the world and that they should reflect ‘best practices’. Leading members of the ICN Steering Committee are protesting that ‘of course, consistently sound antitrust enforcement policy cannot be defined and decreed for others by the US and Canada – not that you would presume to do such a thing’ (Kolasky, 2002: 3). Naturally, the imbalance of power in the structure and functioning of the ICN makes this ‘neutrality’ a discourse more than a reality. Power relations are very much at work but they play out in the guise of hegemonic processes (Foucault, 1994) that are more subtle and more complex to identify and counter.

Whether recommendations are perceived to be scientific and neutral or, in contrast, the products of hegemony, the logic at work remains the same. The idea is to foster, as much as possible, consensus among and across competition authorities. This can be achieved by creating a forum for dialogue and collective work – that is also a social space providing opportunities for various kinds

of peer interactions if not peer pressure. The objective is to create, deepen and spread worldwide the 'culture' of antitrust and competition – which as key actors recognize is part of a 'broader mosaic' and comes together with a culture of 'markets' (Kolasky, 2002: 3–5).

Beyond an international 'club', the ICN strives to become and express what members of the Steering Committee call a 'community of interest' (Finckenstein, 2002). The idea is to create an inclusive and tight network of insiders and to combine and articulate it with a number of weaker external networks reaching out to important constituencies within society. Such a combination should increase the scale and scope of the double effort at culture building and culture spreading. That one of the three original working groups focused on 'advocacy' says enough about the centrality of that double project of 'culture building' and 'culture spreading'. The Advocacy working group gave the following definition of competition advocacy:

Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition. (Advocacy Working Group [AWG], 2002)

The AWG started from a systematic comparison of the situation of member agencies and of their unique national conditions of institutional embeddedness. You do not face the same type of challenges, undeniably, when championing antitrust and competition in the USA, Sweden or Serbia-Montenegro. The AWG sent a questionnaire to each ICN member to build the empirical basis for such comparison. It presented a first report during the Naples Conference, underscoring differing perceptions of the importance of advocacy in each member agency and relating that to a variation in the types of obstacles and challenges that member agencies face in their competition advocacy activities. The ultimate objective of the AWG will be to 'recommend best practices to ICN members and to provide them with information to support their advocacy tasks' with a consideration for the variability of national institutional conditions and local politics (AWG, 2002).

#### TRICKLE-DOWN AND TRICKLE-UP TRAJECTORIES

The ICN does not work on the basis of a logic of constraint or coercion. Members of the Steering Committee are nevertheless explicitly setting themselves a goal: to have an impact on national member countries and their competition regimes and more precisely to drive progressive but real convergence of formal rules but also practices and understandings. We argue that they are hoping to have such an impact in essentially two ways – through what we have called elsewhere trickle-down and trickle-up trajectories (Djelic and Quack, 2003).



First, the ICN should have an impact through what can be called a trickle-down trajectory. Members of the Steering Committee are hoping that ICN work will come to reflect upon national competition regimes in a direct way, through the involvement of representatives from member agencies. The idea is not that members comply with recommended practices right from the outset. Rather, the hope is that they will 'consider them as aspirational goals in the context of evolving national competition frameworks' (Finckenstein, 2003: 13). Members are, in other words, under no obligation to ensure that domestic laws reflect ICN guidelines and recommendations. Each agency will decide whether and how to implement the recommendations – adapting its strategies to local politics and constraints. However, members of the ICN Steering Committee are expecting, on a practical level, 'that as best practice proposals are acted upon by members, a natural peer influence will come to bear on other jurisdictions to do the same' (Finckenstein, 2002: 4).

The type of influence that is hoped for by the ICN Steering Committee in that context is quite parallel to mechanisms of diffusion associated with and attributed to 'epistemic communities' (Haas, 1989). At the same time, the sequence of steps is somewhat different. The ICN is not contributing to the building up of an epistemic community that will then in time 'insinuate itself into the policy making process' of national members, potentially changing it and its supporting institutions quite significantly in the process (Adler and Haas, 1992). Rather, the ICN is hoping to bring closer together an already existing but loosely coupled 'epistemic community' or 'community of interest'. That epistemic community already controls some key institutions nationally and is involved in the policy making process – at least nominally. The ICN aims at closing the ranks of that community both by deepening its common culture and helping to strengthen its local position. This should translate in time into greater convergence and homogenization of practices and policy application.

The ICN Steering Committee hopes that such trickle-down trajectory will combine with a trickle-up one. By opening the network of insiders to representatives of relevant and important constituencies, the Steering Committee hopes to build bridges towards those constituencies. Non-governmental advisors are co-opted and involved in the work of the ICN at many different stages with the idea that they will then become important agents of the fight for competition and antitrust in their respective constituencies. Once a number of local constituencies – or parts thereof – become champions of competition and antitrust, they can push those ideas back up at the governmental level and thus reinforce the impact and influence of competition authorities.

## *Discussion and Conclusion*

The story of antitrust, as told here, is an interesting case and illustration of globalization in the making – globalization as a process. What we document is a step-by-step transformation of important rules of the economic game. A set of local ideas became a tool for international politics and in the process were transformed into globally dominant principles. Those global ideas undeniably have mattered and still do. Their diffusion, however, and the ways in which they have been implemented and turned into practice was very much shaped, as we show, by local politics. Globalization, we propose, is precisely about this interplay and feedback loop – the transformation of local ideas into global principles and the reading of those principles through the prism of local politics.

### BETWEEN THE YEAH AND NAY SAYERS

The image of a ‘runaway world’ (Giddens, 2000) – a very fast train without drivers going along the tracks of market and technological evolutions – will probably remain associated with the 1990s and the associated phenomenon of globalization. During that decade, this image triggered essentially three kinds of reactions.

First were the believers – those who observed, predicted and championed an acceleration of globalization, understood as unavoidable, ahistorical, neutral and progressive force. Global ideas were bound to triumph because they reflected an unavoidable structural evolution. Then came the sceptics for whom the nation-state remained a robust structuring principle. Without denying processes of internationalization, sceptics pointed to the depth of local institutional roots and to the resilience of local politics. This resilience expressed itself through significant hybridization of global ideas or else through a decoupling between those ideas and local practice. Finally, one found the critics – those who agreed that globalization was a reality in the making but did not see it as progressive. Critics pointed to the negative externalities associated with globalization – inequalities, unsustainable growth, ecological disasters or the destruction of cultural and social diversity.

Naturally those three groups had quite different ideas on how to deal with this ‘runaway world’. For believers, forces such as market competition, technological change and rationalization were bringing along wealth, development and social if not moral progress. Those forces hence should be set free and liberated. Political and regulatory intervention created particularly problematic hurdles and obstacles from that perspective. For sceptics this was naive wishful thinking. From the sceptics’ perspective, the nation-state remained extremely robust as a locus of structuration of social and economic life. This vouched for the persistence of differences, made convergence unlikely and in itself this strength of the polity at the national level set limits and constraints to the process of globalization. As for critics, they identified

the withering away of the polity, particularly in its national dimension, as indeed a process associated with globalization. They saw it as one of the negative externalities of a globalizing world, an externality that should be countered. The argument went that, if left to its own devices, globalization could have destructive consequences – particularly on the weak, the marginal, the minorities, the diverse and the different. The polity could play in that context the role of a buffer and filter and each state should act as a counter power on its own territory.

Another and complementary side of the call for governance if not polity has had to do with the space in between – the international arena. Generally, that space has been viewed and described as anomic and apolitical, a space of non-law largely unregulated and leaving free play to market, financial and economic logics. Pleas for curbing the power and strength of those logics in that arena have become not only more widespread but also more mainstream at the turn of our millennium.

#### ANOTHER PERSPECTIVE ON GLOBALIZATION

The story of antitrust illustrates, we propose, a different perspective on globalization – a perspective that was outlined in different places before (Djelic, 1998; Djelic and Quack, 2003). The contemporary episode of globalization can be seen as the articulation of a double process of institution building in the transnational space and institutional change at the national level. Globalization, we argue, is in fact deeply about governance – it is about a transformation of governance systems or rules of the game in many nation-states. It is also about the building, structuration and stabilization of new governance systems in the transnational space. Transnational institution building reflects the transformation of local ideas into global principles. Those global principles in turn interplay with local politics, with a double consequence. On the one hand, local politics translate and transform global principles. On the other hand, those local politics and the peculiar institutional context in which they are set are progressively reshaped and reinvented through the interplay.

The case of antitrust is an illustration that something we can call ‘globalization’ is indeed happening. But it also shows that this globalization is very much a process in the making, partly open ended, quite complex and messy. Globalization is not, far from it, a state of things or a reality. Globalization is not ‘the end of history’ – rather it is our history in the making. National systems, structures and actors are feeling the pressure. They have to react, adapt, adjust to rules of the game with a foreign or transnational origin. At the same time, those rules of the game are themselves in the making and national systems, actors and politics are closely involved, enmeshed and entwined in the process of transnational rule making or institution building.

Hence the perspective on globalization that emerges questions the widespread idea that globalization is an unavoidable, external force that simply

imposes itself. The story of antitrust, and other stories told elsewhere (Djelic, 1998; Djelic and Quack, 2003), show that a lot more is at play than pure market and technological determinism. The process of globalization illustrated here – globalization in the making – is a highly social and political process. A multiplicity of actors are involved in shaping and spreading new rules of the game – and those rules progressively turn into constraining frames including for those actors themselves. In that respect, national states, systems and actors are not merely receiving and passively reacting to external diktats. Some of them, at least, are actively involved in shaping and spreading structural and cognitive frames with an impact on economic behaviours and interactions. Local politics play a significant role in the shaping of global ideas.

The story of antitrust points to the need here to differentiate between at least three different categories of countries. The first category is a peculiar one in that it is a one unit sample. In the story of antitrust – and we have argued elsewhere more generally in the story of the contemporary episode of globalization since 1945 (Djelic, 1998; Djelic and Quack, 2003) – the USA plays a unique role. The place of that country in the process of transnational rule building has no equivalent. The USA is both a key purveyor of ‘models’ – local American rule systems are being ‘exported’ and ‘transnationalized’ – and actively guiding and structuring the process of construction and stabilization of transnational rules in a more or less visible and direct manner. A second category is made up of a few core and rather rich countries (European countries in particular) that are proactive and quite involved in trying to shape that process while not having the same clout and presence as the USA particularly when it comes to the provision of models. The third category of countries, finally, is the larger one in terms of numbers. It brings together those countries that altogether do have a more passive connection to the process of transnational rule building associated with globalization. Within those countries, the process of globalization might often be perceived indeed as an external force, an inescapable logic imposing itself – which does not necessarily mean that this force is having a real impact on local structures, politics and patterns of action. The idea of decoupling is an interesting one here – where the gap could be quite wide between formal institutions and discourses on the one hand and the world of practice on the other.

Globalization, in the way we understand it here, is therefore not (necessarily) about efficiency and the transfer of best practices. Efficiency or effectiveness may or may not be an outcome – this we propose is an empirical question to be tested a posteriori and we would rather remain agnostic on that in this article. The functionalist account, however, that superior economic and technological efficiencies are the main motor of the globalization process does not make sense in light of what we show with the antitrust case. The globalization process, it appears, is highly social and political. It has been and still is about power and interests, networks of actors and flows of influences.

The antitrust case shows also that power and influence may exert themselves in different ways at different historical moments. In the early period, power and influence were on the whole quite raw – reflecting a particularly unbalanced geopolitical equilibrium and often translating into direct coercion mechanisms. Later on, and progressively, power and influence have become neutralized – hidden behind a discourse on scientization, efficiencies and best practices. The USA is not anymore ‘exporting’ a local model. Rather, they claim mastery and ‘scientific leadership’ over a ‘universal’ and ‘natural’ trajectory.

To some degree, globalization thus means Americanization (Djelic, 2002) but we propose the idea of ‘soft Americanization’ to underscore the complex, partly open-ended and negotiated nature of the process. Throughout the period we have dealt with in this article, patterns of and trends towards convergence have for the most part been brought about by the clear predominance of American structural, institutional and normative rules of the game. This predominance reflected a situation of de facto unbalance in geopolitical and geoeconomic power in the post-war period. This dominant model, however, has not spread around in the same way everywhere and with the same impact, as we have shown in the case described in this article. The varied nature of diffusion mechanisms, differences in the institutional grounds of reception, the nature and strength of local politics, the timing of the process in any particular case, all played a role in ‘softening’ diffusion and placing strong limits on ‘convergence’. The story we tell is a story where a local, American, model has progressively been exported and transnationalized through time. While this was undeniably happening, the double process of exportation and transnationalization was, at all stages, a contested and negotiated one. And the original model was evolving in the meantime, being filtered, translated and partly reconstructed and renegotiated through and by local politics. Globalization as we understand it is a world beyond convergence and divergence, reflecting as it does a subtle mix of converging trends and multiple local reading and fighting fields for those trends.

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#### RÉSUMÉ

### *De la Législation Locale à un Cadre de Structuration Global: L'histoire de la Législation Antitrust*

Si on prend une vue à long terme des régimes de compétition, on peut documenter au cours du 20<sup>ème</sup> siècle un cas de transformation exceptionnelle. L'évolution a été double - de la coopération et la cartelisation vers la compétition, d'une part, de régimes définis nationalement vers un cadre de régulation global d'autre part. La tradition de l'antitrust qui émerge aux Etats-Unis au tournant du 20<sup>ème</sup> siècle s'est répandue depuis 1945 et s'est progressivement imposée dans de nombreuses régions du monde. Le but de cet article est de reconstituer le processus par lequel l'antitrust s'est transformé d'une règle locale en un cadre de structuration presque global. Nous suivons le destin d'un ensemble d'idées à l'origine locales qui se transforment en politiques internationales et en principes globalement acceptés. Nous montrons aussi que ces principes globaux interagissent étroitement avec les politiques locales, à travers le processus de diffusion comme au moment de leur implémentation.



## RESUMEN

*De la Legislación Local a un Marco de Estructuración Global:  
La Historia de la Legislación Antitrust*

Si adoptamos una perspectiva amplia de los regímenes de competencia, podemos documentar un caso de gran transformación durante el siglo XX. Hemos visto una doble evolución – pasando de la cooperación y la cartelización hacia la competencia, por un lado, de los regímenes constreñidos a escala nacional, a una esfera reguladora interrelacionada a escala mundial por otro lado. La tradición antitrust que salió de los Estados Unidos al principio del siglo XX obtuvo gran influencia después de 1945, y fue adoptada en muchas regiones del mundo. Este artículo trata de volver sobre el proceso por lo cual la legislación antitrust se ha transformado de una ley local en un marco de estructuración global. Examinamos el destino de una colección local de ideas que se transforman en la política internacional y en principios que son aceptados a escala mundial. Mostramos también que esos principios globales están sujetos a la política local, y que se relacionan con ella – por el proceso de difusión y también por su implementación.

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